

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.549 of 2011

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1. Md. Shahabuddin S/O Sheikh Md. Hasibullah R/O Village - Pratappur, Police Station - Hussainganj, District - Siwan

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Y.V. Giri, Sr. Adv.
Ms. Fauzia Shakil
Mr. Humayun Ahmad Khan

For the Respondent/s : Mr. Abhimnayu Sharma, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

Date: 18-07-2017

This appeal is directed against the judgment and order dated 17.03.2011, passed by Shri Roop Narain Tripathi, learned Special Sessions Judge, Siwan, in Sessions Trial No. 286 of 2009, by which he has convicted the appellant under Sections 25(1-B)(a) and 26(1)/35 of Arms Act and further sentenced him to undergo R.I. for three years and to pay a fine of Rs. 2,000/- under Section 25(1-B)(a) of Arms Act and in default of payment of fine, R.I. for two months. Appellant has further been sentenced to undergo R.I. for five years with a fine of Rs. 2,000/- under Section 26(1)/35 of the Arms Act and in default of payment of fine R.I. for two months. Both the sentences were directed to run concurrently. However,



learned Trial Court has acquitted the appellant from charges under Sections 414 of Indian Penal Code, Section 20 and 21 of the Indian Telegraph Act and Section 26(3) of the Arms Act.

2. The present case has been lodged on the self statement dated 24.04.2005 of S.I., Ranvijay Singh (P.W. 2) that on receiving information from Janta Darbar of the District Magistrate, Siwan, and in the light of decision taken for District Administration, he along with A.S.I., Ayodhya Prasad and Arbind Kumar Khan, S.I. Ved Prakash Mahto of Siwan Town police station, S.I. Birendra Kumar, Dy. S.P. (Headquarter), Siwan, Exexcutive Magistrate, District Transport Officer and other officers and jawans of STF proceeded to raid the guest house of the appellant in village – Pratappur and when he reached there, he saw the officers of forest department, in presence of Executive Magistrate, Shri B.K. Jha, were getting the locks of guest house opened. It is also the case of prosecution that during search in presence of witnesses, a bullet proof jacket, four telescopic rifles sight devices, one night vision device, two walky talky, rifle cleaner, forty six cartridges of different bores were recovered from a room situated on the first floor of the guest house. Apart from arms and ammunitions, foreign currency notes of different denominations were also



recovered. Thereafter, a seizure list was prepared in presence of the witnesses and a copy of the same has been handed over to the father of the appellant. Further prosecution case is that father of the appellant disclosed that the seized arms and arms accessories, ammunitions belong to his son but no valid paper regarding the aforesaid articles were produced.

3. On the basis of the self statement, Hussainganj P.S. Case No. 42 of 2005 was registered, under Section 414 Indian Penal Code and 25 (1-b)(a), 26 of the Arms Act as well as under Section 13(1) FEMA, 1999 and Section 20 and 21 of the Indian Telegraph Act, 1985.

4. It further appears from the perusal of the record that on a petition filed on behalf of the Assistant Director, Directorate Enforcement, FEMA, Kolkata learned Chief Judicial Magistrate, Siwan directed the investigating officer of this case to hand over the seized foreign currencies to the Assistant Director, Enforcement Directorate and the same was handed over to Sri A.K. Mohanti, Assistant Director, Enforcement Directorate, FEMA Kolkata for investigation. As such the appellant has not been put on trial for the offences under the FEMA in the present case.

5. Initially, charges were framed against the appellant under



Section 25 (1-B)(a), 26 of the Arms Act as well as under Section 414 Indian Penal Code and under Sections 20 and 21 of the Indian Telegraph Act in the court of Spl. Judicial Magistrate, Siwan and trial was proceeded before the Spl. Judicial Magistrate, Siwan in which 07 witnesses were examined by the prosecution. However, at the stage of argument, a petition under Section 216 Cr.P.C. was filed on behalf of prosecution for alteration of charge i.e. to add the charges under Sections 25 (1)(1-a) and 35 of the Arms Act and Section 122 Indian Penal Code. Learned Spl. Judicial Magistrate, Siwan, partly allowed the petition and charge under Section 35 of the Arms Act was allowed to be framed. It further appears that later on a petition, under Section 323 Cr.P.C., was filed on behalf of prosecution for commitment of the case to the court of sessions which was rejected on 20.11.2008 and thereafter a revision was preferred by the State being Cr. Rev. No. 536 of 2008 before this court which was dismissed. However, later on, vide order dated 04.02.2010 passed in Cr.Rev. No. 187 of 2009, the learned Sessions Judge held that on the materials available on record a case under Section 26(3) of the Arms Act is also made out against the appellant, which is exclusively triable by the Court of Sessions. Then, the case was committed to the court of sessions as such the



trial of the appellant commenced afresh in the Court of learned Spl. Sessions Judge, Siwan.

6. Charges were again framed against appellant under Section 25 (1-B)(a), 26 (3), 35 and 26 of the Arms Act and further under Sections 20 and 21 of the Indian Telegraph Act and under Section 414 of the Indian Penal Code.

7. Appellant has pleaded not guilty of the charges.

8. Learned trial court after trial, convicted the appellant under Sections 25 (1-B)(a) and 26 (1)/35 of the Arms Act. However, he has acquitted the appellant from the charges under Sections 20 and 21 of the Telegraph Act and from the charges under Section 414 of the Indian Penal Code and Section 26(3) of the Arms Act and has sentenced the appellant, as stated above, against which the present appeal has been preferred.

9. Appellant has challenged the search & seizure made by the police on the ground that no search was made in the house of the appellant and nothing has been recovered from his house, which will appear from the fact that though seizure list Ext. 1, shows that the same was prepared at 8 A.M. on 24.04.2005 and it is claimed by the prosecution that the search was made under the leadership of Mr. B.K. Jha, Executive Magistrate, P.W. 3 and he has stated in para 9 of his evidence that he was instructed by the District Magistrate to provide



refreshment at Pratappur and he has gone there with the refreshment between 10.30 to 11.30 A.M. and further he has also deposed in his cross –examination that he was deputed in the examination conducted by the Bihar Public Service Commission on 24.05.2005 and etx and C/1 which is the notification of District Magistrate, also shows that P.W. 3 and P.W. 7 were deputed in the examination of Bihar Public Service Commission on 24.04.2005 as such there presence at the place of occurrence and seizure in their presence, itself is doubtful. Further no independent witness of village pratappur has been examined in support of the search & seizure and P.W. 8, the then Mukhiya of the village Pratappur has been examined but he has also not supported the case of prosecution and has been declared hostile. It has also been argued that the above fact clearly makes the prosecution story of search & seizure concocted and manufactured. It has further been argued that P.W. 2, who is the informant and he had made the seizure in present case and taken over the investigation of the case also, which is clearly against the law settled by Hon'ble Supreme Court and in support of his contention he has relied upon the decision of Hon'ble Supreme Court in the case of **Megha Singh v. State of Haryana** reported in *1996 (11) SCC 709* and in the case of **State by Inspector General of Police, Narotic Intelligence Bureau, Madurai, Tamilnadu v. Rajangham** reported in *2010(15)SCC*



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10. Learned counsel for the appellant has also assailed the judgment and order of sentence on the ground that there is no evidence available on record to show that such articles were sealed as provided under Clause 165 of Bihar Police Manual, whereas, P.W. 2 in para -24 and 25 of his cross-examination has admitted that he has not mentioned in case diary that the seized articles were sealed or any entry has been made in *Malkhana* register disclosed that the procedures prescribed in the police manual had not been followed and in that connection, learned counsel for the appellant has relied various decisions, which will be discussed later on. Further submission of learned counsel for the appellant is that there is delay in sending the seized articles for examination and the delay has not been explained coupled with the fact that examination has been done by Seargent Major and not by a ballistic expert or by FSL and is highly doubtful that whether the Seargent Major was competent enough to examine the seized articles and also delay in sending the seized articles cannot rule out the possibility of articles being tampered and also creates doubt about the genuineness of the recovery and in support of this contention, learned counsel for the appellant has also relied upon various decisions, which will be



discussed later on.

11. Learned counsel for the state on the other hand, has submitted that there are enough cogent, consistent and reliable evidence available on record to show that the house of the appellant has been raided and seized articles has been recovered from his house, which were kept in attachee and under the bed and in spite of rigorous cross-examination of the witnesses, there is nothing in their cross-examination to discredit the evidence regarding search & seizure made in the house of the appellant. It has also been submitted that the evidence of police witness is as important as of independent witness and their evidence cannot be doubted merely on the ground that they are police witness rather their evidence requires close scrutiny. It has also been argued that not only police witness were present at the place of occurrence but other officers such as District Magistrate, S.P. Executive Magistrate, and DTO and other officials were also present there and in their presence search was made and their signatures are there over the seizure list.

12. Further submission of learned counsel for the State is that when there are consistent evidences available on record, they cannot be discarded merely on the ground of technicalities and aforesaid consistent evidences clearly proves the factum of search



& seizure and recovery of seized articles. Further those articles were kept inside the bed and also kept in attachee, hence the conviction of appellant under the aforesaid Sections of Arms Act, has rightly been made and does not require any interference.

13. In the above background, this Court proceeds to examine the evidences available on record.

14. It appears from perusal of the record that the prosecution has examined altogether 08 witnesses and they are; P.W. 1 Birendra Kumar Pandey J.S.I, P.W. 2 Ran Vijay Singh (S.H.O. as well as informant), P.W. 3 Binod Kumar Jha, who was posted as Executive Magistrate, Siwan at the time of raid, P.W. 4 Ved Prakash Mahto, Circle Inspector, P.W. 5 Arvind Kumar Khan A.S.I, P.W. 6 Peter Barla (the then Seargent Major posted at police line, Siwan), P.W. 7 Mirja Arif Raza (the then APO DRDA posted at Siwan) and P.W. 8 Sheikh Hatim, Mukhiya of village – Pratappur, P.S – Hussainganj.

15. Following documents have been proved and brought on record as Exhibits on behalf of the prosecution and they are as follows:-

- (i) Ext. 1- Seizure list in the writing of SHO Ranvijay Singh (P.W.2)
- (ii)Ext. 1/1- signature of B.K. Jha, Executive Magistrate (P.W. 3) on the seizure list.



- (iii) Ext. 1/2 Signature of Mirza Arif Raza (P.W. 7) on the seizure list.
- (iv) Ext. 1/3 Signature of Md. Ashfhak khan on the seizure list.
- (v) Ext. 1/4 Signature of Sheikh Hatim (P.W. 8) on the seizure list.
- (vi) Ext. 1/5 Signature of S.M. Hasibullah, father of appellant on the seizure list.
- (vii) Ext. 1/6 Signature of P.W. 6 on the Test Report.
- (viii) Ext. 2 Self statement of P.W. 2
- (ix) Ext. 2/1 Formal F.I.R.
- (x) Ext. 3, License cancellation order of the Arms in the name of Smt. Hina Shahab.
- (xi) Ext. 3/1 License cancellation order of the Arms in the name of S.M. Hasibullah
- (xii) Ext. 3/2 License cancellation order of the Arms in the name of S.M. Samsuddin.

It further appears that following seized articles were produced in the Court and they are;

M. Ext. - I Night Vision Device

M. Ext. - II Telescopic night device

M. Ext. - III to III/2 Three telescopic night devices

M. Ext. - IV - Bullet Proof Jacket

M. Ext. - V to V/1 Two rifle cleaners

M. Ext. - VI to VI/1 Two walky talkies

M. Ext. - VII to VII/1 Two cartridges of 12 bore

M. Ext - VIII to VIII/1 Cartridges of 30.06 bore



M. Ext - IX to IX/31 Cartridges of 30.06 bore

M. Ext. - X to X/7 Cartridges of 12 bore.

16. On behalf of the defence, no oral evidence has been adduced but following documents have been brought on record and they are;

Ext. A to A/6 are the license of different Arms in the name of appellant and his family members. Ext. B is the renewal card of the walky-talky issued by Ministry of Communication and Information Technology, Government of India and Ext. C to C/2 are the signatures of District Magistrate Siwan and S.P. Siwan on different memos.

17. PW-2 is the informant of this case and in his evidence-in-chief, he has stated that on 24.04.2005, the raid was conducted at the guest house of the appellant in presence of D.T.O. Mirza Arif Raza, Dy. S.P.(Headquarter), Laldhari Prasad, A.S.I. Arbind Kumar Khan, A.S.I. Ayodhya Prasad, S.I. Ved Prakash Mehto, A.S.I. V.K. Pandey and other armed forces under the leadership of the Executive Magistrate B.K.Jha, and from the south-west room at the first floor of the Guest House in the southern and western room, 10 cartridges of 12 bore gun, 36 cartridges of 30.06 were recovered, which were found kept under the bed on a *palang* (cot). Further bullet proof jacket, three telescopic rifle sight devices, one night



visions device, two walky talky, one rifle cleaner, 7600 American Dollar, 10540 Reyads and 800 Dirhams were recovered from an *attachee* kept in the room. All the articles were seized after following the due procedure and after preparation of seizure list, copy of the seizure list was handed over to father of the appellant, who disclosed that these articles belong to his son. He has also proved the seized articles in court as material ext. I to X/7. Evidence in chief of this witness shows that seized cartridges were sent to the Sergeant Major, Peter Barla (P.W. 6) for examination and the walky talky was sent to Director General. His evidence also discloses that he obtained sanction order, which is under signature of District Magistrate. This witness has been cross-examined at length by the defence in para – 10 to 12 that licenses are in favour of the appellant and his family members. His cross-examination in para -12 also shows that he sent chowkidar to the appellant for producing licenses, but the same was not produced. Para -21 of his cross examination shows that appellant was not present on the day of raid. In para -23, he has admitted that at the time of preparation of seizure list other persons were also present. His attention has been drawn towards the statement made by other witnesses before list, but there is nothing in those statements, which may falsify the



story of search & seizure.

18. PW-1 has stated in his evidence that on the date of occurrence, he was posted as J.S.I. in Siwan Police Station and he has accompanied the raiding party to the house of appellant and the evidence in chief of this witness shows that seized articles were recovered during the raid and thereafter seizure list was prepared and a copy of the same was handed over to the father of the appellant. In his cross-examination he has admitted that he had lodged a case of intimidation against the appellant earlier. Apart from some minor discrepancies, there is nothing in his evidence to doubt about the seizure of the articles recovered from the house of the appellant. Further his attention has also been drawn towards his earlier evidence made before the Magistrate and these are not of much significance. Overall, this witness has fully supported the case of prosecution so far search and recovery of ammunitions from the house of appellant is concerned.

19. PW-3 has stated in his evidence in chief that he was posted as Executive Magistrate, Siwan on 24.04.2005 at 8:00 A.M., he along with S.P., D.M, S.H.O. Hussainganj, A.P.O, Dy. S.P. and other police force, searched the house of the appellant. His evidence also discloses that during search, seized articles were recovered and he



has proved his signature on the seizure memo and he has also proved the signature of Mirza Arif Raza and the informant. This witness has not been cross-examined so far seizure is concerned, however, a suggestion has been given to him that no search was made before him nor any seizure list was prepared and he has not visited the village Pratappur, which has been denied by him. In para 9 and 10, he has stated that on that day, he was deputed as Zonal Officer for the purpose of BPSC examination and he had performed that work also. 17.PW-4 has stated that in April, 2005, he was posted as Officer-in-Charge, Town Police Station Siwan and on 24.04.2005 at 8:30 P.M he along with Sri B.P.Pandey, Sub Inspector and Mr. P.K.Jha, Executive Magistrate along with other officials and armed forces raided the house of appellant and during the search, seized articles were recovered and seizure list was prepared and in his cross-examination , his attention was drawn towards the earlier evidence made before the Magistrate and he has admitted that at that time that appellant was not present and his wife and children were also not present in the house.

20. PW-5 has stated that in April, 2005, he was posted at Hussainganj P.S. as A.S.I. and on 24.04.2005 at 8:00 A.M., he, along with the officer-in-charge, Hussainganj P.S., Mr. B.K.Jha,



Executive Magistrate, Mirza Arif Raza District Transport Officer along with the officers of the Forest Department and armed forces raided the Guest House of the appellant and at that time, Mukhia of the village was also present there. His evidence in chief also shows that seized articles were recovered from the house of the appellants and a seizure list was prepared. He has been cross-examined about the seizure and he has stated that he could not recollect that on 24.4.2005 how many articles were recovered and how many seizure list were prepared.

21. P.W. 6 has stated in his evidence in chief that in the year 2005, he was posted as Sergeant Major at Siwan Police Line and he had examined the cartridges and arms seized in Hussainganj P.S. Case No. No. 42 of 2005 and found all the cartridges live and in working condition. He further stated that he then prepared a report and proved the report and signature on the report as Ext. 1/6. In his cross-examination, he has stated that he has not seen 30.06 bore bolt action and semi automatic rifle and all the material exhibits are not prohibited cartridges

22. P.W. 7 has stated in his evidence in chief that in the year 2005, he was posted as APO DRDA, Siwan and on 24.04.2005 at 8.00 A.M. in the morning, he along with B.K. Jha, Executive



Magistrate, Officer In-charge, Hussainganj Police Station along with other officers and arms forces went to the house of the appellant in connection with raid and search. This witness has further stated about the seizure of the bullets, night vision device, bullet proof jacket and foreign currencies. This witness has also stated that seizure list was prepared and he identified his signature. Thereon. This witness has also been cross examined to show that he was on duty in the examination of Bihar Public Service Commission on 24.04.2005., then he stated that he does not remember.

23. P.W. 8 in his evidence in chief has stated that in the April 2005, he was the Mukhiya of village Pratappur and he has denied that officer In-charge of Hussainganj Police Station had called him during the raid in the house of appellant. However, he has proved his signature on the seizure list. His evidence further shows that nothing has been recovered in his presence. Thereafter, this witness was declared hostile and his attention was also drawn towards his earlier statement made before the police, to which he resiled from his previous statement.

24. From the evidence discussed above, it appears that P.W. 2, has supported the prosecution case as stated in the written report



and his evidence finds further support from the evidence of P.W. 1 P.W. 4 and P.W. 5, who are the police witnesses and his evidence finds further support from the evidence of P.W. 3, Shri B.K. Jha and P.W. 7, Mirza Arif Raza and evidence in chief of P.W. 3, clearly shows that during the search articles such as telescopic sight devices, cartridges, foreign currencies bullet proof jacket etc. were recovered and he identified his signature on seizure memo and P.W. 7 has also supported the prosecution case about the search & seizure and stated about the seizure of telescopic sight devices, cartridges, foreign currencies bullet proof jacket etc., and further stated that seizure list was prepared and he identified his signature on seizure list. When attention of P.W. 3, was drawn towards evidence before the Magistrate, during earlier trial, he has stated in para -6 of his cross-examination he has deposed before the Magistrate that on 24.04.2005, he was Deputy Collector Nazarat and was in charge of supply department also and in the morning, he received information through driver of the Collector to come to village Pratappur with refreshment. Further in para -26, he has also stated that on that information, he had gone to village Pratappur at about 10.30 to 11.30 with refreshment and at that time District Magistrate, S.P. and other officials were also present and he stayed



there for thirty to forty minutes at Village Pratappur. Exts. C & C3, notification of District Magistrate, which shows P.W. 3 and P.W. 7 were assigned duty in the examination conducted by Bihar Public Service Commission on 24.04.2005, P.W. 3 has admitted in para 9 and 10 that he has been deputed at the examination of BPSC on 24.04.2005 as Zonal Manager. However, this witness has categorically stated that on the instruction of District Magistrate, he had come for the search of the house of the appellant and he was present there in presence of District Magistrate itself. P.W. 3 and P.W. 7 are Public Servants/Government Officials and not police officers and they have also supported the prosecution case of search & seizure, made in the house of the appellant. Both the witnesses have categorically stated in their evidence in chief that they reached at 8. A.M. on 24.04.2005 and also stated about the seizure of articles and about his signature on the seizure list. Neither the deposition before the Magistrate in the present case nor the F.I.R. of Hussainganj P.S. Case No. 43 of 2005, have been brought on record as exhibits. On the other hand, all the witnesses have stated about the presence of P.W. 3 and P.W. 7, at the place of occurrence/raid and his signature was also there on the seizure list.



25. In this case, it appears that no independent witness was examined in support of prosecution story of search & seizure, however, taking into consideration that the appellant was the then Member of Parliament of that area and naturally he was an influential person and in such a situation, if no independent person came forward to depose in support of the prosecution, that is quite understandable under the prevailing circumstance and on that score prosecution case cannot be doubted. Furthermore, nowadays, people in general are not interested in coming forward and depose. Prosecution witnesses are police officers and Government Officials but it is settled principle that their evidence cannot be doubted on the basis that they are public officers rather their evidence needs to be subjected to strict scrutiny as far as possible and may be corroborated with the other material particulars. Hon'ble Supreme Court in a case of *Pradeep Narayan Madgonkar Etc. ... vs State Of Maharashtra* reported in *1995 (4)SCC 255* has held in para 11 "Indeed, the evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigating or the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration Of



their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony.’

26. Apart from that P.W. 8 is the Mukhiya of village Pratappur and he is a seizure list witness also. However, he has been declared hostile by the prosecution as he has not supported the prosecution case. However, he identified his signature on seizure list as ext. 1/4. This witness has denied from his statement made before police under Section 161 Cr.P.C, when his attention was drawn towards the same. However, P.W. 2, who is the I.O. of the case has proved what P.W. 8, has stated before him and he has stated that on 26.04.2005, he was called by the local police at police station and his signature was obtained on 26.04.2005. He has also stated that he, along with father of the appellant went to police station but no cross-examination was made to other P.Ws about the presence of father of the appellant at the time of search & seizure rather other P.Ws has also supported the prosecution case about the presence of father of the appellant. As such, it appears from the above fact that P.W. 8 is not speaking truly.

27. Learned counsel for the appellant has argued that there are discrepancies in the evidence of P.Ws from their earlier evidence



made before the Magistrate and that also creates doubt about the credibility of those witnesses. However, on close scrutiny of evidences of P.Ws there appears nothing in their evidence to doubt about their credibility or discredit their evidences rather their evidences are consistent on point of search and seizure.

28. In this case P.W. 2 is the I.O. of the case and he has made seizure of the articles and he was also investigating officer. Learned counsel for the appellant vigorously argued that when the informant is Investigating Officer also, there cannot be a fair investigation. In support of his contention, learned counsel for the appellant cited decisions of Hon'ble Apex Court, in the case of ***Megha Singh vs. State of Haryana*** reported in (1996) 11 SCC 709 and in case of ***Inspector General of Police, Narotic Intelligence Bureau, Madurai, Tamilnadu v. Rajangham*** reported in 2010(15)SCC 364 and submitted that no reliance can be placed on such investigation.

29. On perusal of the above Judgments cited by learned counsel for the appellant, it appears that in the case of Megha Singh (supra), Hon'ble Supreme Court in para -4 of the said judgment has observed that:

“4. After considering the facts and circumstances of the case, it appears to us that there is discrepancy in the depositions of the P.Ws. 2 and 3 and in the absence



of any independent corroboration such discrepancy does not inspire confidence about the reliability of the prosecution case. We have also noted another disturbing feature in this case. PW-3, Siri Chand, head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under [Section 161, Cr.P.C.](#) Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.

30. In the case of **State v. Rajangham** (supra), the ratio of the case of **Megha Singh** (supra), was followed.

31. Hon'ble Supreme Court in the above cited decisions deprecated the practice of informant becoming investigating officer and found it to be fatal. In the present case, there are consistent evidence that the seizure was made from the house of the appellant



and seizure list was prepared in presence of Magistrate B.K. Jha, P.W. 3 and Mirza Arif Raza, P.W. 7 and other witnesses also. In spite of cross examination of the witnesses, there is nothing to show that no such seizure was made from the house of the appellant. Whereas, in the case of **Megha Singh** (supra), it appears that in that case accused was arrested by P.W. 3, Head Constable in presence of P.W. 2, Constable and pistol and cartridges were recovered and in the case of **State v. Rajangham** (supra), in that case also contraband has been seized by the P.W. 6, the Police Officer in presence of other constables. In both the cases, seizure was made only in presence of police witnesses. In the present case, two Government Officers i.e. P.W. 3 and P.W. 7 have supported the prosecution case and it is not so that only P.W. 2 was present at the time of seizure. On seizure list also, signatures of P.W. 3 and P.W. 7 are there. Hence, the facts of the present case is slightly different to those cases, relied upon by learned counsel for the appellant.

32. Appellant has also assailed the judgment on the ground that that as per prosecution case, seizure was made on 24.04.2005, whereas, the seized articles sent for examination on 15.07.2005 i.e. after lapse of more than two and half months, which itself creates a



doubt about the preparation of report and about genuineness of recovery and in support of his submission, learned counsel for the appellant has relied upon the decision of Hon'ble Apex Court in the case of **Baldev Singh v. State of Punjab** reported in **1990 (4) SCC 692**, in the case of **Kartar Singh v. State of Punjab** reported in **1993 (Suppl.) (2) SCC 74** and in the case of **Surendar alias Babli vs. State (NCT of Delhi)** reported in **2011(15) SCC 546**. Further contention of learned counsel for the appellant is that there is no evidence to show that seized articles were actually sealed or properly kept and the procedure prescribed under Clause 165 of Bihar Police Manual has been followed for seizure as well as for keeping it in Malkhana, whereas, the evidence of P.W. 2 in para -8 and 9, shows that the seized articles were not sealed. This created a serious doubt on the genuineness of seized articles and possibility of tampering with the seized articles cannot be ruled out. In this context, learned counsel for the appellant has relied upon the decision of Hon'ble Apex Court in the case of **Baldev Singh v. State of Punjab** (supra), in the case of **Sahib Singh v. State of Punjab** reported in **(1996) 11 SCC 685**, in the case of **Amarjit Singh v. State of Punjab** reported in **1995 (Supp) (3) SCC 217** and the case of **Chitwant Singh v. State of Punjab** reported in



(1998)9 SCC 549.

33. Hon'ble Apex Court in the case of **Baldev Singh v. State of Punjab** (supra), has considered the point of delay in sending the seized articles as well as non sealing of the articles and considering the fact that Exh. P-5 though seized on 15.1.1975, was sent to the Forensic Science Laboratory only on 27.1.1975 and also after considering other circumstances, came to conclusion that these create doubt about the connection of this cartridge "Exhibit CI with the crime. In the case of **Kartar Singh v. State of Punjab** reported in **(1993) Supp (2) SCC 740** Hon'ble Supreme Court has held in para -8 of the judgment as follows:-

"8. having regard to the above material contradictions seen in the light of the delay in sending the arm for mechanical test coupled with failure to sent the cartridges to PW. 2 armourer we are disinclined to accept the version of the prosecution. We cannot merely rest our conclusion on the statement suffered by the accused during investigation as is done by the learned Judge of the designated court. Under these circumstances, we are obliged to reject the case of the prosecution, which means the appellant is entitled for acquittal."

Hon'ble Supreme Court in the case of **Surender Alias Babli v. State (NCT of Delhi)** (supra) has held in para -6 of the Judgment



as follows:-

“6. The weapon was allegedly recovered at the instance of the appellant on 28.02.2001 as per the prosecution story, but curiously enough the bullet as well as the weapon were dispatched to the laboratory together on 3.4.2001. We are unable to fathom as to why the investigating agency did not deem it proper to sent the bullet to the laboratory soon after its recovery and the fact that they chose to wait for the weapon of offence to be recovered, casts a clear doubt as the sanctity of the recovery.”

34. Above view was also affirmed by Hon’ble Apex Court in the case of **Sahib Singh Vs. State of Punjab** (supra) as well as in the case of **Amarjit Singh Vs. State of Punjab** (supra) and also in the case of **Chitwant Singh v. State of Punjab** (supra).

35. Hence, Hon’ble Supreme Court has consistently held that the delay in sending the articles makes the document suspicious and on the basis of the same, it is highly unsafe to convict the appellant when the seizing authority has not followed the minimum precaution of the articles being packeted and sealed properly.

36. In the present case, P.W. 2 has stated in para -3 that “बरामद सामानों का विधिवत जप्ती सूची बनाकर जप्त किया गया” . In para -24, his attention has been drawn towards the case diary, on which he has



stated that he has not mentioned as to whether articles were seized and as to when the seized articles were sent to the Sergeant Major and when it was received back and in para -25, he has stated that the material exhibits were kept in police station for months and at that time there was no *Malkhana* entry number mentioned in the diary. Except above, there is no cross-examination of P.W. 2 on the point as to whether the material exhibits were properly sealed or not. Even no suggestion has been given to P.W. 2. On the other hand, those material exhibits had been sent for examination to Sergeant Major, (P.W. 6) and he has submitted a report which is Ext. 1/6. Material exhibits has also been brought before the Court and was proved by P.W. 2 in his evidence. Neither P.W. 2 nor P.W. 6 has been confronted by the defence on the point of articles being sealed, nor any objection was raised about the genuineness of material exhibits or doubting the material exhibits which have been seized from the place of occurrence. This court is conscious of settled principle of criminal trial that prosecution has to establish its case and cannot take advantage of weakness of the defence. However, in the present case, P.W. 2 has stated in his evidence that articles were seized after preparation of seizure, as per law. In such a situation, when there is no evidence contrary to that it cannot be



said that the articles were not seized.

37. On the other hand, specific question was put to the appellant in statement under Section 313 Cr.P.C. and he has simply stated that he has no knowledge about the seizure of articles and he did not choose to deny the seizure from his house.

38. Prosecution evidence shows that there is delay in sending seized articles to P.W. 6 for examination. Now the question arises, when there is consistent evidences available on record about search and seizure of Material Exhibits, which were examined by P.W. 6 and those exhibits were produced in the Court also, defence has not challenged the genuineness of those Material Exhibits and there was no suggestion that those articles were tampered, will it be proper to grant the prosecution, benefit of doubt on the ground of irregularity or illegality. Hon'ble Supreme Court, in the case of **Leela Ram V. State of Haryana** reported in **AIR 1999 SC 3717**, held in para 8 as under:-

“8 Before however, proceeding with the matter on two counts as above, it would be convenient to note another aspect of the matter, namely, the observations pertaining to the investigation by the Investigating Agency. It is now a well settled principle that nay irregularity or even an illegality during investigation ought not to be treated as a ground to



reject the prosecution case and we need not dilate on the issue excepting referring a decision of this Court [vide State of Rajasthan v. Kishore, AIR 1996 SC 3035: (1996 AIR SCW 1392 : 1996 Cri. LJ 2003)]

39. In the present case, when there is evidence of P.W. 2 that he has seized the articles as per procedure and prepared the seizure list and nothing is available on record to show that those articles were either tampered or they are not the recovered articles. In such a situation, disbelieving the entire prosecution case on the ground alone that articles were not sealed and there was delay in sending the articles for examination, does not appear to be just and proper.

40. Further submission of learned counsel for the appellant is that material exhibits have not been sent to Forensic Science Laboratory for examination, and they were examined by P.W. 6, Seargent Major, who is not an expert and is not competent to examine those articles.

41. In this case P.W. 6 has examined the material exhibits and he has stated in his evidence in chief that he found the seized cartridges live and further he has also proved his report as Ext. 1/6. He was the then Sergeant Major of police line. This witness was neither cross-examined nor any suggestion has been given that he is



not competent to examine the seized articles nor he has any experience of examining the same. On the other hand, he was cross examined about the quality of the cartridges and his cross examination does not, in any manner, show that he is not competent to say about the quality of seized articles. Sergeant Major is in-charge armourary and he is looking after arms and ammunitions kept in District Police Line in the State, as such, it cannot be said that he is not competent to examine seized articles.

42. It is the contention of the defence that appellant and his family members have got several licenses of fire arms in their names and the seized articles are cartridges and accessories of fire arms and as such keeping the cartridges and fire arms and their accessories, does not make out any offence under the provisions of Arms Act. In support of this contention, learned counsel for the appellant has brought the arms licenses standing in the name of appellant and his family members viz. appellant (two licenses), his father (two licenses), his wife (one license), Ekram Ali, brother of the appellant (one license) and Md. Shafique, brother of the appellant (one license) on the record as ext. A to A/6.

43. On the other hand, prosecution has brought on record three order of District Magistrate, Siwan, which is Ext. 3 to 3/2 by which



arms licenses standing in the name of Smt. Heena Shahab, wife of the appellant, Shri S. M. Hasibullah, father of the appellant and Shri S.M. Shamsuddin, brother of the appellant have been cancelled under Section 17(3) of the Arms Act, 1989 with immediate effect vide order dated 06.04.2005. It further appears from the record that prosecution filed true copy of order dated 17.03.2005 of District Magistrate, Siwan, through which, fire arm license standing in the name of the appellant was cancelled with direction that copy of the order be served to licensee by registered post and the learned Trial Court in para -21 of the Judgment under appeal has also observed this fact and admitted that appellant and his family members were holding fire arm licenses in their names and those licenses were revoked/cancelled by the District Magistrate, Siwan about one and half months ago from the alleged date of occurrence/raid and even after cancellation of licenses, those arms were not deposited in the police station and for that another case being Hussainganj P.S. Case No. 114 of 2005 dated 26.08.2008 has been instituted and copy of the same has been exhibited as ext. 9.

44. Apart from that evidence of P.W. 2 shows that father of the appellant disclosed that all the seized articles belong to his elder son i.e. appellant, who was the Member of Parliament at that time



and copy of seizure list was also given to him but no cross-examination has been made to P.W. 2 about the same nor any denial has been taken from him nor father of the appellant has been produced before the Court to deny the same. Those seized articles, which have been produced in the Court and marked as material exhibits, have been examined by P.W. 6- Sergeant Major and he has stated in his evidence that 2 cartridges of 12 bores are live and 31 cartridges of 30.06 are of semi-automatic rifle and there is no sign of firing on them and five cartridges of silver colour of 30.06 are live cartridges. Similarly, he has proved that eight cartridges of 12 bore marked as I.O.F. and they are also live cartridges and he has proved and examined other exhibits and all the exhibits were found to be live. Report of P.W. 6 has been marked as ext. 1/6 and that corroborate the evidence of P.W. 6.

45. Apart from that night vision device, Telescopic night devices were also seized and as per Section 2(e) of the Arms Act, Firearms includes its accessories also. As such those articles also come under the definition of Firearm. Apart from that on perusal of Ext. A to A/6 i.e. the licenses issued in the name of appellant and others, it appears that licenses with respect to DBL Gun, DBL Rifle and pistols were surrendered but licenses with respect to night vision device, telescopic



night device were not surrendered and that also does not include in ext. A to A/6.

46. It has been argued that in a case under Section 25(1-B)a of the Arms Act, pre condition is the possession i.e. conscious possession and it is an admitted position that appellant was not present there and as such holding him guilty under Section 25(1-B)a of the Arms Act, is not proper and in support of his contention, learned counsel for the appellant has relied upon a decision in the case of Gunwantlal vs The State Of Madhya Pradesh reported in (1972) 2 SCC 194. On perusal of the said Judgment, Hon'ble Supreme Court has considered the meaning of word "possession" used under Arms Act and in para 5, it has been held as follows:-

In the view we have taken, if the possession of the appellant includes the constructive possession of the firearm in question then even though he had parted with physical possession on the date when it was recovered, he will nonetheless be deemed to be in possession of that firearm.

47. In the present case, there are consistent evidence that one bullet proof jacket, four pieces of telescopic rifles night devices, one night vision device along with other articles were recovered from the room of the house of the appellant and those articles were



found kept in an *attachee*. Further prosecution evidence is that 12 cartridges of 12 bore gun and 46 cartridges of 30.06 caliber and some foreign currencies and other articles were kept inside the bed over the *palang*. Learned Trial Judge after considering the facts and circumstances has observed that telescopic rifle sight devices, one night vision device, recovered from the house of the appellant are accessories of any such fire arm designed or adapted to diminish the noise or flash caused by firing and thus come within the definition of fire arm under Section 2(e) of Arms Act. Hence, for the possession of these accessories, necessary license is required to be obtained, however, as discussed above, no such license has been produced by the defence to possess or keep such accessories, hence the accused has contravened the provisions of Section 3 of the Arms Act. Hence, the above finding of the Trial Court appears to be just and proper.

48. Learned counsel for the appellant has drawn my attention towards Section 26(1) of the Arms Act which provides that; “[26 *Secret Contraventions* -(1) *Whoever does any act in contravention of any of the provisions of section 3, 4, 10 or 12 in such manner as to indicate an intention that such act may not be known to any public servant or to any person employed or working upon a*



railway, aircraft, vessel, vehicle or any other means of conveyance, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and also with fine” and submitted that on plain reading of Section 26(1) of the Arms Act, it would appear that it deals with the manner and intention to conceal something that may not be known to any public servant, however, in the present case nothing is available on record to show that the appellant has concealed the seized articles with an intention that they may not come in public glare, which is essential for conviction under Section 26(1) of the Arms Act and in support of this contention, learned counsel for the appellant has relied upon the Judgment of Hon’ble Supreme Court in the case of **Pabitar Singh v. State of Bihar** reported in (1972) 3 SCC 354. From perusal of the aforesaid judgment, it appears that in that case a gun was recovered from a room of the quarter, which was in joint possession of two person and one of them was not present at the time of raid, mere presence of other in that room was held not sufficient to make him guilty of the offence unless the court can come to the conclusion that there was reason to believe that he was aware of the existence of the gun in that room. Since the prosecution failed to prove that he was in sole occupation of that



room at the time of raid and the gun was concealed in such a manner that it was not visible to the naked eye, it cannot be said that he was aware of existence of the gun as such; on that ground Hon'ble Supreme Court has acquitted the appellant giving him benefit of doubt. Learned counsel for the appellant has also cited a decision of Patna High Court in the case of ***Chandan Sonkar v. State of Bihar*** reported in ***(1997) 2 PLJR 171*** and in that case, appellant was found sleeping in a cot in a room and on search, a single barrel gun was recovered from beneath the bed, it was alleged that alleged another single barrel gun was engraved and wrapped in a cloth and 14 live cartridges were found concealed in a nearby sofa and the High Court, considering the aforesaid fact held in para-7 and 10 as under:-

“7. From bare perusal of the aforesaid section, it is manifest that mere holding or possessing firearms is not enough but he possession of firearms must be in such a manner which would indicate the intention of the person to conceal the same so that the public servant may not know the concealment of the firearms.

.....

10. The learned Sessions Judge has not referred any evidence or material in his judgment which was available on record for coming to this finding that the concealment was with the intention that such



concealment may not come to the knowledge of any public servant, I myself analysed the evidence of the prosecution witnesses and found that it has not come in the evidence that the appellant was aware of the fact that a raid was to be conducted by the police and in order to conceal the firearms from the raiding party the appellant concealed the said arms. In absence of such evidence the conviction of the appellant under Section 26(1) of the Arms Act is not justified. As stated above, the only allegation is that firearms were found in possession of the appellant which was wrapped in a cloth and was kept beneath the cot and the sofa. This itself is not sufficient to come to an inference that the concealment of the arms was with the intention that it may not be known to the public servant. The conviction of the appellant under Section 26(1) of the Arms Act, in my opinion, cannot be sustained in law and is liable to be set aside.”

49. In the present case, evidences clearly show that several cartridges were recovered beneath the bed and bullet proof jacket, telescopic rifles sight devices, night vision device and other articles were recovered from an attachee of a room situated in the guest house of the appellant and appellant recorded has not denied the recovery of articles rather shown ignorance about the same in his statement under Section 313 Cr.P.C.. On the other hand, defence has produced arms licenses Ext. A to A/6 issued in favour of



appellant and his family members to justify the presence of cartridges, in such a situation, it is difficult to believe that appellant has no knowledge about telescopic rifles sight devices, night vision device, which are also accessories of fire arm as defined under Section 2(e) of the Arms Act and no license was produced on behalf of the appellant for those articles. Further exhibit 3 to 3/2 shows that licenses of those arms have already been cancelled by the District Magistrate, the appellant and others were directed to deposit the same but the same were not deposited. So far the decisions referred by learned counsel for the appellant is concerned, it appears that in those cases arms were recovered under the bed, whereas, in the present case articles were recovered from an *attachee* and from the *palang* covered by bed, which were not visible by naked eyes, which shows that those articles were concealed with a view that they may not come in the public knowledge or public glare, hence, the facts of the present case is slightly different from the cases as referred above.

50. Another contention of learned counsel for the appellant is that in absence of charge under Section 35, conviction of the appellant under Section 25(1-B)a, and 26 of the Arms Act with the aid of Section 35 of Arms Act, is not sustainable as no charge under Section 25(1-B)a read with Section 35 and Section 26(1) read with Section 35 of the Arms Act, has been framed in this case. However, from perusal



of Section 464 of Cr.P.C, it appears that the said Section deals with effect of omission to frame, or absence of, or error in, charge and it provides as follows:-

“464. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

51. Hon’ble Supreme Court in a case of **Main Pal vs. State of**



Haryana reported in (2010) 10 SCC 13 has dealt with Section 211, 212, 215 and Section 464 of Cr.P.C. and on perusal of the above judgment, it appears the that principle laid down in that object behind framing of charge is to enable an accused to have clear idea of what he is being tried for and essential facts. Accused is entitled to know with certainty and accuracy exact nature of charge against him and unless he has such knowledge. In the present case, charges were framed against the appellant under Section 35 of the Arms Act but a separate charge has been framed against the appellant under Section 35 as well as under Section 25(1-B)a and 26(1) of the Arms Act. As such appellant was in the knowledge of charge under Section 35 of the Arms Act separately as such non framing of charge under Section 25(1-B)a and 26(1) read with Section 35 of the Arms Act, in my opinion is only an error and has not caused any prejudice to the appellant.

52. A submission has also been made by learned counsel for the appellant that he has remained in custody for long and he is entitled for commutation of sentence for the period already undergone in judicial custody, under Section 428 of Cr.P.C, which provides as follows:-

“S.428- Period of detention undergone by the accused to be set off against the sentence of imprisonment.- Where an accused person has, on



conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.”

53. So far application of Section 428 Cr.P.C. is concerned, the same has been considered in what was under consideration in several times before the Hon’ble Apex Court and before this Court also and this Court in the case of Prabhu Sah vs. The State of Bihar & Ors. has dismissed the point of setting off of Section 428 Cr.P.C. and after considering all the judgments of Hon’ble Apex Court has held in paragraphs-28, 29 & 30 of the judgment as follows :

“28. From the aforesaid judgments what we find the true interpretation of S.428 of the Code of Criminal Procedure is that the period of set off as contemplated under Section 428, Cr.P.C. would be the period when in that case a person is first under remand custody as an under-trial and then he is sentenced. If there be more than one case, then, the remand period of each case would be set off against sentence in that case alone separately for each case even though the remand period may overlap, but the period spent as serving out sentence as a convict is one case cannot be taken into account as a remand period as an under-trial in another case.”

29. In our view, taking any other view would be contrary to the legislative policy. The legislative policy of Section 428 is not to reduce sentence or obliterate the period of punishment but to restrict



the sentence effectually to the period awarded by giving benefit of pre-sentence detention in the case where he is ultimately sentenced otherwise as noticed in Atul Manubhai Parekh's case (AIR 2010 SC (Supp) 429) (supra) it would lead to absurd and unintended results. A person on different dates would commit different and distinct offences but if multiple benefits were to be given on pre-sentence detention of one case to another then if he was ultimately sentenced on different dates for different offences for different periods which we may say to be 3 years, 4 years or 7 years, he will get away with only singular punishment of 7 years even though he has committed many more offences and was punished several times, he would go escort free unpunished so far as the other crime is concerned. That surely is not the legislative intent. The set off would ultimately be on a case to cases basis excluding period during which he is serving out sentence as substantively he is not then an under-trial. The distinction as repeatedly drawn by the Apex Court between the nature and status of detention has to be kept in mind.

30. If we apply this principle then the contention of the State in the present case has to be upheld. The remand period in the third case when he was already undergoing life imprisonment consequent to his conviction in the second case cannot enure to his benefit in terms of Section 428, Cr.P.C. That is the latest dictum of the Apex Court after noticing all the earlier case in the case of Atul Manubhai Parekh (AIR 2010 SC (Supp) 429) (supra)."

54. Considering the entire discussions made above, I do not find any infirmity either legal or factual in the Judgment. As such conviction and Sentence therein of the appellant vide impugned Judgment and order dated 17.03.2011, passed by Shri Roop Narain



Tripathi, learned Special Sessions Judge, Siwan, in Sessions Trial No. 286 of 2009, is hereby affirmed.

55. In view of the discussions made above, the commutation of custody already undergone shall be governed by law laid down by a Division Bench of this Court, as discussed above.

56. In the result, this appeal is dismissed.

(Vinod Kumar Sinha, J)

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